IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO.1218 OF 1997.

M/s.Girivijay Enterprises & ors.: Appellants.

versus

M/s.Sync Overseas Marketing

Pvt.Ltd. : Respondents.

Mr.V.T.Walawalkar for the appellants.

Mr.O.S.Kutty for the respondents.

CORAM : D.G.DESHPANDE,J.

DATED : 28th April 2005.

JUDGMENT :-

1. This is an appeal filed by the defendants. Both the advocates have given their written submissions and, therefore, I am deciding this appeal on the basis of the written submissions and the record.

2. The plaintiff placed an order with the defendants on 14th October 1995 for supplying 1000 pieces of base plates and 300 pieces of C.I. Housing. The order was for Rs.1,06,000/-. The plaintiff had paid advance amount of Rs.30,000/- by a cheque dated 19th October 1995 to the defendants. Delivery of the items was to be given by defendants on or before 15th November 1995. This cheque of Rs.30,000/- was realised by the defendants. The defendants were required to be persuaded for delivery, but they made part delivery of 100 pieces of MS base plates on 20th December 1995 worth Rs.21,350/-. Remaining items could not be delivered because of the difficulties of the defendants. The balance of Rs.8,650/- was, therefore, lying with the defendants for which the plaintiff wrote a letter dated 20th March 1996 demanding the balance. Defendant No.2 approached the plaintiff in the first week of July 1996 and expressed their difficulties and promised to deliver the goods as early as possible and prayed for advance of Rs.25,000/-. Accordingly, a cheque of Rs.25,000/- was given by the plaintiff to the defendants on 25th July 1996 in the name of

defendant No.1. It was encahsed on 26th July 1996 itself. But thereafter the delivery could not be effected by the defendants. Therefore upon breach of agreement by the defendants, the plaintiff wrote a letter dated 22nd August 1996 demanding the balance amount. But the defendants did not pay back the amount of Rs.33,650/- and, therefore, the suit came to be filed.

3. The defendants filed their written statement. The story of the plaintiff up to the supply of items worth Rs.21,350/- is admitted. But according to the defendants, in December 1995 they told the plaintiff that the remaining material was ready for delivery as per the purchase order and the plaintiff should take the delivery by paying Rs.51,000/-. A cheque of Rs.28,500/- dated 22nd January 1996 was, therefore, given by the plaintiff, but that was dishonoured. Another request was made to the plaintiff to issue a fresh cheque and to take the delivery of balance quantity material. But the plaintiff neither paid Rs.51,000/- nor took the delivery, because, according to the defendants, the plaintiff had no funds. Then defendants waited for 9 months and issued a demand notice

dated 25th September 1996 requesting the plaintiff to pay Rs.51,000/- plus 24189/- and take the delivery. In July 1996 a cheque of Rs.25,000/- came to be given by the plaintiff because the plaintiff wanted the material. In view of these contentions the defendants prayed for dismissal of the suit. The written statement further shows that the defendants have demanded Rs.75,000/- as a counter claim. But in spite of going through the entire record and the legal submissions, I do not find that the defendants had paid court fee on that counter claim and, in the impugned judgment also there is no reference to the counter claim. Therefore, now only question is, whether a decree passed by the trial Court is proper.

4. From the written submissions of the appellants/defendants it appears that there was no cancellation of the order by the plaintiff at any time before 22nd August 1996. This letter, sent under certificate of posting, is firstly false and, secondly, there is no proof of service. Same is the case about the another letter dated 20th March 1996. This is also sent by the plaintiff under certificate of posting and

the defendant had not received this letter. Therefore, there is no cancellation of order at any time by the plaintiff. Secondly, according to the defendants, time was not an essence of contract. It has to be noted at this juncture that the written notes of argument of the appellants are running into 38 pages. First 13 pages are devoted to the letters sent by under certificate of posting. From page 13 the arguments and submissions are about whether the time was essence of contract. Then remaining pages are devoted to the so called minute scrutiny of the evidence and admissions. Ultimately the prayer, of-course, is for allowing the appeal and dismissal of the suit.

5. On the other hand the plaintiff has also given its written submissions running into 14 pages deal with the case of the appellants and all the aforesaid points in short. This is, therefore, a case where, the plaint is of 8 pages, written statement is of 10 pages, evidence of one witness each examined by the plaintiff and defendants and, Issue is, whether the plaintiff is entitled to recover the amount? and, whether the judgment of the trial Court is proper or not?

Therefore, in view of this matter, it is necessary to go to the evidence. The plaintiff examined Sudhakar Manjayya Shetty - the Managing Director of the plaintiff's company. The date of order is 14.10.1995; a cheque is of Rs.30,000/- given on 19.10.1995; it is encahsed; the goods were to be supplied, as per this witness, by 15.11.1995. In January 1996 the defendants supplied goods worth Rs.21,350/-; then second cheque of Rs.28,500/- was given as the goods were to be kept ready on 25.1.1996; the plaintiff has sent it's Director to collect the goods, but the defendants were not available and, therefore, stop payment instructions came to be given to the bank by the plaintiff; then on 20.3.1996 a letter was sent under certificate of posting for refund of amount and treating the order cancelled; in July 1996 the defendants requested for financial assistance; the defendants promised to supply the balance quantity by July 1996, therefore, a cheque of Rs.25,000/-was given on 25.7.1996; quantity was not ready, therefore, another letter was written on 22.8.96 for refund with interest, this letter was also sent under certificate of posting; the defendants did not supply the balance quantity and, therefore, the

plaintiff was entitled for decree. This witness was cross examined. But nothing fruitful has been brought on record.

6. The defendants examined Girish Manohar Chindade. He has stated about the initial order; payment of Rs.30,000/- by cheque by the plaintiff. He has stated about the dishonoured cheque of Rs.28,500/- and stated that the plaintiff were facing financial crises, therefore, they did not make payment. He has not uttered any word about any counter claim in his evidence. In the cross examination, this witness has admitted that he has signed the purchase order. He has stated that in September 1996 he sent a legal notice to the plaintiff. In his examination-in-chief, he has not uttered any single word and no question was put to him, whether he has received notice or letters of the plaintiff sent under certificate of posting. The cross examination is concluded by asking 8 to 10 questions.

7. This is, therefore, a case where the

plaint is short, evidence is of one witness each, but the written notes of arguments at least of the appellants are disproportionately exhaustive repeating same point again and again. In any case, that does not affect the merit of the case at all. From the written submissions and the evidence on record it is clear that there was an order for supply of goods worth Rs.One lakh. Rs.30,000/- were paid. Out of that the defendants supplied goods worth Rs.21,350/-. Then again an another payment Rs.25,000/- in July was made but no goods for that price at least were supplied. The question is of who is at fault. Whether the defendants had manufactured and kept those items ready for delivery; Whether the plaintiff was unable to take the delivery because of its financial difficulties. The trial Court has decreed the suit accepting the case of the plaintiff and rejecting the defence. I have already noted that not a single question was asked to the witness for the defendant in his examination in chief as to whether he has received the notice or letters sent by the plaintiff under certificate of posting. There is, therefore, no denial on oath by the defendant before the Court about the receipt of those

letters. But the question, in my opinion, is not of any items of cancellation of the agreement. The question is, whether the defendants succeeded in proving that they had manufactured the requisite quantity of material and had kept it for delivery and, my answer is in the negative.

8. It is to be noted that initial order is dated 14.10.1995, Rs.30000/- are paid to the defendants, the defendants supplied some articles worth Rs.21,350/-, then cheque of Rs.25,000/- was given in July and, according to him, the goods were ready for delivery; he gave notice in September 1996. Time may or may not be an essence of agreement, but a person placing an order in October; paying advance of Rs.30,000/- certainly requires immediate delivery of goods. He cannot be expect to wait for delivery of the goods up to September. It is true that the defendants have made part delivery of goods without delay. The question is of remaining part delivery and, the claim of the plaintiff is only for Rs.33000/- and odd.

9. As between the conduct of the plaintiff

and the defendants, the conduct of the plaintiff appears to be more natural realistic. The plaintiff has made payment to the defendants of Rs.30,000/- even before receiving any articles from the defendants. That was the payment in advance. In fact the plaintiff could have insisted the defendants first for delivering the goods and then he will be paid, but the plaintiff paid Rs.30,000/- by cheque in advance. Thereafter again when an amount of Rs.8000/- and odd was lying with the defendants from the first order as balance out of Rs.30,000/- the plaintiff gave a cheque of Rs.25,000/- in July. That was also not against the delivery but against the promise of delivery. In these circumstances, therefore, when the plaintiff has paid advance on two occasions without taking delivery or before delivery then plaintiff's case is required to be trusted more than that of the defendants coupled with the fact that there is no denial on oath by the defendants in their evidence of the receipt of letters of the plaintiff sent under certificate of posting. All these arguments advanced by the counsel for the appellants in this regard has to be rejected out right.

10. The witness for the defendants has further admitted in his cross examination that in the purchase order delivery date is 15th October 1995 i.e. as per Exhibit A. He admitted that he did not supply the items mentioned in the purchase order before 15.11.1995. Firstly, the items were delivered on 21.11.1995, therefore, this is a case where the defendants committed breach of the purchase order. But even then he wants to capitalise and trying to avoid the liability putting the blame upon the plaintiffs. The third thing, that gives credit to the plaintiffs, is giving of cheque of Rs.28,500/-, the payment of which had ultimately to be stopped. Therefore, this is a case where before getting delivery the plaintiffs went on giving cheques to the defendants and, consequently, as between two versions the evidence of the plaintiffs has to be given more weightage than the defence of the defendants. The plaintiffs are not in a position to pay for the balance amount is totally false and bogus. Since this case, as discussed by me, is totally based on the limited oral evidence and pleadings, but no legal question arises in this matter and authorities cited by the appellants about the validity and

value of certificate of positing are not required to be considered, because not a word is uttered in denial on oath by the defendants in their evidence regarding those two letters of the plaintiffs. There is no substance in this appeal. No interference is required for. Hence the appeal is dismissed with costs through out.

[D.G.DESHPANDE]

28/04/2005 JUDGE.